NG CHUN LIN & ANOR

v.

FOO LIAN SIN & ANOR

HIGH COURT MALAYA, IPOH
KANG HWEE GEE J
[CIVIL SUIT NO: 22-118-96]
8 APRIL 2000

CONTRACT: *Mistake - Mutual/common mistake - Sale of two adjoining shop lots to plaintiffs and defendants respectively by common seller - Whether respective shop lot was conveyed to respective purchaser correctly - Whether a common mistake had occurred in the conveyance of shop lots - Whether court could order rectification under s. 30 Specific Relief Act 1950 - Whether s. 30 applicable only to two contracting parties - Whether plaintiffs and defendants in a contractual relationship with common seller but not with each other - Whether a collateral contract could be implied in the circumstances*

This suit arose from the conveyance of two adjoining shop lots nos. 9 and 11 which the parties herein purchased from a common seller. The plaintiffs contended that they were supposed to purchase shop lot no 9 whilst the defendants were to purchase shop lot no 11. However, a common mistake occurred in the conveyance of the respective lots which had resulted in the plaintiffs becoming the registered proprietor of shop lot no. 11 and the defendants becoming the registered proprietor of shop lot no. 9. Thus, the plaintiffs commenced this action for rectification of the said mistake.

The defendants submitted that they had no contractual relationship with the plaintiffs. Their contractual relationship was exclusively with the common seller. Therefore, there was no privity of contract less so a common mistake in the transaction. The defendants sought by way of counter-claim, an order that the plaintiffs deliver up vacant possession of shop lot no. 9 and be liable in mesne profits of RM1,000 per month until delivery of possession.

Held:

[1] An agreement entered into between the parties under a mutual mistake is void both at common law and equity in two categories of cases: (i) where the subject matter of the contract without the knowledge of the parties did not exist or had ceased to exist at the time when they entered into the contract (*res extincta*); and (ii) where unknown to the parties, the buyer is already the owner of that which the seller purports to sell him (*res sua*).

[1a] But where the subject matter of the contract was not *res extincta* or *res sua*, a party entering into a contract under a mutual mistake may avail himself of remedies in equity to apply to set aside the contract on such terms as are just. And where the common mistake is with respect to an entry in a document, the affected party may bring an action in equity to rectify the mistake in the document to reflect the real intention of the parties.

[2] Having heard the parties, this court was convinced that there was a mistake in the conveyance of the shop lots to the respective parties.

[3] The rule with respect to the rectification of instrument under s. 30 of the Specific Relief Act 1950 ('the Act') is concerned with "mutual mistakes of the parties" which could only arise between parties to a contract. It followed that unless the plaintiffs establish in law that there was a contractual relationship with the defendants, a rectification of the register document of title of their property did not arise.

[4] As between the plaintiffs and the defendants there was no visible agreement as such as they had each entered into a separate sales and purchase agreement with the common seller. But the question of whether a contract exists or not between parties has to be adjudged not by merely what the parties have outwardly intended but also by what they have said, written or done. To do justice, the courts may have to go beyond immediate inferences that may be drawn from words and acts and may construct therefrom a contract between persons who would seem, at first sight, not to be in contractual relationship with each other at all.

[5] It was clear that the 2nd plaintiff had agreed to purchase shop lot no 9 after being told by the common seller that the 1st defendant had wanted to purchase the same lot and that he was being offered the 1st option to purchase, and that the 1st defendant had only purchased shop lot no 11 as the 2nd plaintiff would be purchasing shop lot no 9. From this reciprocal understanding and arrangement one could legitimately conceptualise a contract within the paradigm as suggested in the case of *Heibut Symonds & Co*.

[6] A collateral contract is founded on the representation that a party may have made to the other party that which may have induced him to enter into the main contract. The representation and inducement that led to the collateral contract herein was self-evident. Further, a collateral contract need not be constructed by the same parties to the main contract. It can be contracted with a common third party where the contractual relationship is common to both parties.

[7] Where the common mistake is with respect to an entry in a document, the affected party may bring an action in equity to rectify the mistake to reflect the real intention of the parties.

[8] The rules of equity pertaining to rectification apply to land registered under the National Land Code 1965 ('the Code') notwithstanding that the transferee enjoys indefeasibility of title under s. 340 of the said Code.

[7] Having established the existence of the collateral contract, and a common mistake in the conveyance of the respective lots of properties, it followed that the plaintiffs were entitled to activate the provisions of s. 30 of the Specific Relief Act 1950 and the Registrar or Land Administrator could be directed under s. 417 of the Code to make the necessary rectification on the respective registrar document of title as well as on the issue document of title.

Obiter:

[1] In a suit for rectification of mistake in the conveyance of properties, the prayer should first seek a declaration that there was a mutual mistake in the conveyance of the properties to be followed by an ancillary prayer for an order to rectify.

[Plaintiffs' application allowed; counter-claim dismissed with costs.]

Case(s) referred to:

Clarke v. The Earl of Dunraven and Mount-Earl [1897] AC 59 ***(refd)***
Cooper v. Phibbs [1867] LR 2 HL 149 ***(refd)***
Craddock Brothers Ltd v. Hunt [1923] 2 Ch 136 ***(refd)***
Dick Bentley Productions, Ltd v. Harold Smith (Motors), Ltd [1965] 2 All ER 65 ***(refd)***
Esso Petroleum Ltd v. Customs and Excise Comrs [1976] 1 All ER 117 ***(refd)***
Frederick E Rose (London) Ltd v. William H Pim & Co Ltd [1953] 2 QB 450 ***(refd)***
Heibut, Symonds & Co v. Buckleton [1913] AC 30 ***(refd)***
Kah Seng Construction Sdn Bhd v. Selsin Development Sdn Bhd [1997] 1 CLJ Supp 448 ***(refd)***
Kluang Wood Products Sdn Bhd v. Hong Leong Finance Bhd [1994] 4 CLJ 141 ***(refd)***
Lovell and Christmas Ltd v. Wall [1911] 104 LT 85 ***(refd)***
Oh Hiam & Ors v. Tham Kong [1967] 1 MLJ 65 ***(refd)***
Rayfield v. Hand [1958] 2 All ER 194 ***(refd)***
Shankling Pier Ltd v. Detel Products Ltd [1951] 2 All ER 471 ***(refd)***
Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177 ***(refd)***
Tan Swee Hoe Co Ltd v. Ali Hussein Bros [1980] 2 MLJ 16 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 21
National Land Code 1965, ss. 340, 417
Specific Relief Act 1950, s. 30

Specific Relief Act 1963 [India], s. 26

Other source(s) referred to:
Cheshire Fifoot & Furmstone's Law of Contract, Second Singapore and Malaysian Edition, Andrew Phang Boon Leong, 1998 edn, p 388
Cheshire Fifoot & Furmstone's Law of Contract, 12th edn, p 28
The Law of Specific Relief, Dr SC Banerjee, 1988, 8th edn, p 413

For the plaintiffs - Ng Poh Tat; M/s Ng Poh Tat & Co
For the defendants - Yau Wai Leong; M/s Chan & Assoc

Reported by AG Kalidas

JUDGMENT

Kang Hwee Gee J:

This suit arose from the conveyance of two adjoining shop lots which the parties had purchased from a common seller.

The plaintiffs contended that a common mistake had occurred in the conveyance of the respective land which had resulted in the defendants becoming the registered proprietor of the land on the shop purchased by the plaintiffs and the plaintiffs the registered proprietor of the land on the shop purchased by the defendants.

It is common ground that before the sale of the properties:

(i) the 2nd plaintiff was occupying the shop with the address, No. 9 Tingkat Kledang 14, Taman Kledang, 31450 Ipoh Perak which stood **on land held under HS (D) Ka 6792/79 PT 18177, as** a tenant of a company called Hung Chun Sdn Bhd. He operated a provision shop on this lot.

(ii) the 1st defendant were occupying the shop with the address, No 11 Tingkat Kledang 14, Taman Kledang, 31450 Ipoh Perak which stood **on land held under HS (D) Ka 6793/79 PT 18178, also as** a tenant of Hung Chun Sdn Bhd.

(iii) the 1st defendant operated a mini market at their own shop at No. 7 Tingkat Kledang 14 which adjoined shop No. 9.

Both the 1st plaintiff and the 2nd defendant were uninvolved parties in this action. They were cited as parties only because they became co-proprietors in the conveyance of the respective property now in dispute.

The plaintiffs commenced this action seeking (in the translated form as it appears in the written submission of counsel for the plaintiffs):

1. a declaration that the names of the plaintiffs as registered in the memorial of the Registered Document of Title for land held under HS (D) KA 39024 (formerly known as HS (D) KA 6793/79) for lot PT 18178, in the Mukim of Ulu Kinta, Perak (the 1st land) be cancelled by the Registrar of Land Titles Perak. And in turn their names be registered in the documents of title for land held under HS (D) KA 39023 (formerly known as HS (D) KA 6792/79 for lot PT 18177, Mukim of Ulu Kinta, Perak (the 2nd land);

2. a declaration that the names of the Defendants as registered in the memorial of the Registered Document of Titles for the 2nd Land be cancelled by the Registrar of Title and in turn their names be registered in the Registered Document of Titles for the 1st Land.

The two prayers appear to have suffered from inapt drafting. It is evident that one does not seek a declaration to cancel a memorial in the register document of title. Rather, the prayer should first seek a declaration that there was a mutual mistake in the conveyance of the two lots of properties which resulted in the incorrect memorial being entered in the register document of title and issue document of title with respect to the proprietorship of the respective property – to be followed by an ancillary prayer for an order that the Registrar of Titles be directed to rectify the register and issue documents of title accordingly.

However, the intention of the plaintiffs in this suit is not incomprehensible and therefore not in vain. It is clear that they are seeking the rectification of the mistake in the conveyance of the two lots of properties, the facts of which I shall now set out in greater detail.

How It All Started

The managing director of Hung Chun Sdn Bhd (the landlord of shops No. 9 and 11) was a Mr. Yee Weng Thong.

According to Mr. Yee the 1st defendant approached him offering to buy over the shop No. 11 of which he was the tenant at the time and also the adjoining shop No. 9 which was occupied by the plaintiffs.

Mr. Yee replied that he was willing to sell both the shops if the price was right. But in respect of the shop No. 9 which was being tenanted to the 2nd plaintiff he told the 1st defendant that as a matter of principle he would have to offer it to the 2nd plaintiff first. He would only sell shop No. 9 to the 1st defendant if the 2nd plaintiff would not buy it.

As it turned out the 2nd plaintiff wanted to purchase the shop. Mr. Yee then informed the 1st defendant of the 2nd plaintiff's intention and said that he could sell only shop No. 11 to him. The other shop No. 9 would have to be sold to the 2nd plaintiff. The 1st defendant agreed.

Later he took both the 2nd plaintiff and the 1st defendant to see the solicitor. He told the solicitor that shop No. 9 was to be sold to the 2nd plaintiff and shop No. 11 to the 1st defendant.

He gave the solicitor a photocopy of the title deed of the respective lot on which he had by error marked No. 9 on the copy of the title deed No. 6793/79 and No. 11 on the title deed No. 6792/79.

The correct marking should have been the reverse - No. 9 on title deed 6792/79 and No. 11 on title deed 6793/79.

The signing of the agreement took place one or two weeks later at the solicitor's office. The solicitor explained to both the 2nd plaintiff and the 1st defendant the contents of the respective agreement which they subsequently proceeded to sign on.

Some nine months later the 2nd plaintiff defendant came to see him to complain that he had been wrongly given the title deed for shop No. 11 whereas he had actually purchased from him shop No. 9. Mr. Yee said he then tried to settle the matter amicably by requesting the parties to rectify the mistake through the solicitor. The defendants refused.

The upstairs portion of both the lots were let out to tenants before the sale. After the sale the plaintiffs collected rental from the tenant of shop No. 9 and the defendants from the tenant of shop No. 11, respectively as the new landlord.

At The Office Of The Solicitors - Dato' Daniel Tay

The solicitor who prepared the sales and purchase agreement for the respective lot and subsequently conveyed them to the respective purchasers was one Dato' Daniel Tay.

He gave evidence that sometime before 11 May 1994, Mr. Yee, the 2nd plaintiff, and the 1st defendant visited him at his office for the purpose of

the conveyance. On the instruction of all the three of them he was to convey shop No. 9 to the plaintiffs and shop No. 11 to the defendants.

He said he had explained to the 1st defendant in particular, that he was purchasing shop No. 11.

Nevertheless without so much as admitting to any negligence or mistake on his part he said he relied on the markings in pencil made by Mr. Yee on the respective photocopy of the title deed designating No. 9 to the 2nd plaintiff and No. 11 to 1st defendant which the latter had handed to him, to prepare the respective sales and purchase agreement on the basis that –

(i) the plaintiffs would be purchasing shop No. 9 on land held under HS (D) Ka 6793/79 PT 18178.

(ii) the defendants would be purchasing shop No. 11 on land held under HS (D) Ka 6792/79 PT 18177.

The lands were subsequently conveyed to the plaintiffs and the defendants in the manner as they appear in the respective sales and purchase agreement with the plaintiff becoming the registered proprietor of HS (D) Ka 6793/79 and the defendants of HS (D) Ka 6792/79 PT 18177 in the issue document of titles and the register document of title at the land office.

Some Months Later – The Disagreement

According to the 2nd plaintiff Lim Suan Tian he had all along since 1983 been occupying shop No. 9 where he operated his sundry shop as a tenant of the Hung Chun Sdn Bhd, the company of which Mr. Yee was a director.

Mr. Yee went to see him one day to ask him whether he was interested to purchase the shop he was occupying telling him that if he did not want to buy it, someone else would want to buy it. He admitted in cross-examination that Mr. Yee did not disclose to him at the time that the 1st defendant was the person who wanted to buy the lot. He told Mr. Yee he needed time to consider and finally when he decided to buy it, he went over to see Mr. Yee to inform him that he would be buying shop No. 9 jointly with the 1st plaintiff.

Subsequently, on 13 May 1994 he, the 1st plaintiff and Mr. Yee went to the solicitor's office to sign the sales and purchase agreement. At that office Mr. Yee handed over two photostat copies of the title deeds and informed the solicitor that shop No. 9 was to be sold to him and shop No. 11 to the 1st defendant.

Five or six months later he realised there was a mistake in the conveyance of the respective lot when he received a notice of assessment from the City Council for shop No. 11 instead of for shop No. 9 which he had purchased.

After the purchase he had bought fire insurance for his lot and had been collecting rental of RM200 per month from the tenant who occupied the upstairs portion of the shop.

The 1st defendant however denied there was any mistake in the conveyance to him of shop No. 9. He insisted that the correct property had been registered in his favour – this notwithstanding that the sales and purchase agreement he entered into with the owner described the shop as No. 11.

He said he had operated his mini market business on shop No. 7 which he owned and had all along wanted to purchase the adjoining shop No. 9 in order to expand his mini market business. In April 1994 he went to look for Mr. Yee Weng Thong and offered to buy shop No. 9 (the shop on which the 2nd plaintiff was a tenant) as well as shop No. 11 (the shop on which he was a tenant).

He said Mr. Yee agreed to sell the two lots to him for the price of RM150,000 each but later informed him that he could only sell shop No. 11 to him as he wanted to sell shop No. 9 to the plaintiffs. He was unhappy and insisted on buying shop No. 9 which was being occupied by the plaintiffs.

Mr. Yee then agreed to sell shop No. 9 to him at the price of RM156,000 saying he would sell shop No. 11 to the 1st plaintiff at RM158,000 thereby affording him a discount of RM2000 for not being able to sell both the lots to him.

At the solicitor's office later, Mr Yee handed over the title deed to the solicitor Dato' Daniel and informed him that he wanted to sell shop No. 9 to him. A photocopy of the deed was shown to him and no number was written on it. The 2nd plaintiff was not there at the time. The solicitor explained to him clearly before he signed the sales and purchase agreement that the shop he was purchasing was shop No. 9 which at the time he knew was being occupied by the plaintiffs. He said he raised the question of vacant possession of shop No. 9 but the solicitor informed him that the transfer of the shop to him could be done only after obtaining the Menteri Besar's consent. In any case he had intended to obtain vacant possession of shop No. 9 only after the Chinese New Year. This was because he had stocked a lot of soft drinks at shop No. 11 and it would be inconvenient for him to vacate that shop to enable the plaintiffs to shift into.

He claimed that he became aware of the error in the shop number in the sales and purchase agreement he signed with the seller some six months later when the 2nd plaintiff came to see him to ask him to re-transfer shop No. 9 to him. He had refused as he had bought the correct shop No. 9.

Mr. Yee had also advised him to pay the plaintiffs a compensation of RM2,000 so as to enable them to take possession of shop No. 9 which the plaintiffs were now occupying to which he had agreed.

He admitted that he had been collecting rent from the tenant who was occupying the upstairs portion of shop No. 11 until April 1995.

The Counter-Claim

The defendants have their own grievance. They are not prepared to leave the matter in *status quo* whereby the plaintiffs can continue to occupy the shop which they claimed they had rightfully purchased. They now seek by way of a counter-claim an order that the plaintiffs deliver up vacant possession and be liable in mesne profits of RM1,000 per month until possession is delivered up.

The Law

Before proceeding to consider the evidence I shall for convenience consider the law which have to be applied in this case.

An agreement entered into between the parties under a mutual mistake is void both at common law and equity in two categories of cases. The first category encompasses such cases where the subject matter of the contract without the knowledge of the parties did not exist or had ceased to exist at the time when they entered into the contract *(res extincta)*. The second category consists of such analogous case where unknown to the buyer is already the owner of that which the seller purports to sell him *(res sua)*.

The contract has to be void in the first instance because there is nothing for the parties to enter into a contract if the subject matter is not in existence; and in the second instance because there is nothing for the seller to sell if the subject matter had already belonged to the buyer.

(See *Cheshire, Fifoot and Furmstone's Law of Contract* Second Singapore and Malaysian Edition, Andrew Phang Boon Leong, 1998 edition on the chapter on Unenforceable contracts at p. 388.)

This English common law principle of contract is grafted into s. 21 of the Contracts Act 1950 which provides as follows:

21 Agreement void where both parties are under mistake as to matter of fact.

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation - An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustration

(a) A agrees to sell B a specific cargo of goods supposed to be on its way from England to Kelang. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C, B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void

But where the subject matter of the contract was not *res extincta* or *res sua*, a party entering into a contract under a mutual mistake may avail himself of remedies in equity to apply to set aside the contract on such terms as are just (*Cooper v. Phibbs* [1867] LR 2 HL 149). And where the common mistake is with respect to an entry in a document, the affected party may bring an action in equity to rectify the mistake in the document to reflect the real intention of the parties.

As Cozen Hardy MR said in *Lovell and Christmas Ltd v. Wall* [1911], 104 LT 85, 88:

> The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible and indeed essential.

The extent to which the court would be prepared to order rectification is well illustrated in *Craddock Brothers Ltd v. Hunt* [1923] 2 Ch 136 wherein by reason of a mutual mistake made in reducing a verbal agreement into writing of a sale of a property, a yard was mistakenly included in the formal and

written instrument and was subsequently conveyed to the purchaser. Rectification of the conveyance was ordered in that case notwithstanding that it would result in the grant of specific performance in defiance of the rule that no parole evidence was admissible to vary the terms of a written contract.

In handing down the decision Warrington LJ went on to set out in detail (at p. 159) the principle upon which rectification may be ordered in like cases:

> The jurisdiction of the courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying of giving effect to the whole of that contract by writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon or omitted something that was agreed upon, or otherwise departed from its terms. If these conditions are fulfilled then it seems to me on principle that the instrument so rectified should have the same force as if the mistake had not been made, in which case the statute of frauds would be no defence to an action founded upon it.

Here in our jurisdiction the principle is embodied in s. 30 of the Specific Relief Act 1950 which provides as follows:

> Rectification Of Instruments
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> 30. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the court find it clearly proved that there has been fraud or mistake in framing the instrument and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.
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> **Illustrations**
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> (a) A, intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B, in which, through B's fraud, all three godowns are included. Of the two godowns, which were fraudulently included, B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C, but it cannot be rectified so as to affect D's lease.
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> (b) By a marriage settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators, and assigns, during A's life, an annuity of $5,000. C dies insolvent and

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> the official receiver claims the annuity from A. The court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the official receiver has no right to any part of the annuity.

b The parties in the instant case however, are not treading on unfamiliar ground. Although precedents with respect to the rectification of the register document of title that comes close to the factual matrix of the instant case are rare, the law had in fact been laid by Gill J (as he then was) some 30 years back in *Oh Hiam & Ors v. Tham Kong* [1967] 1 MLJ 65.

c In that case the parties had entered into a contract for the sale and purchase of certain lands at Gombak but by a mistake common to both the parties the subsequent conveyance transferred not only the lands agreed to be sold to the buyer but also another piece of land in Setapak. The transfer was set aside in that case and rectification of the transfer made pursuant to the agreement was d granted by ordering the defendant to re-transfer the Setapak land back to the plaintiff.

The judgment also set the law pertaining to the doctrine of indefeasibility under s. 340 of the National Land Code (previously s. 42 of the FMS Land Code) e by its ruling that the rules of equity pertaining to rectification apply to land registered under the National Land Code notwithstanding that the transferee enjoys indefeasibility of title under the section, thus settling the very issue raised by counsel for the defendants in the instant case.

The judgment of Gill J was reversed on appeal to the Federal Court but was f affirmed both on findings of facts and law on further appeal to the Privy Council (see [1980] 2 MLJ 159).

Was There A Common Mistake?

The extent to which equity was prepared to lend its hand to rectify a document g was considered by Denning LJ (as he then was) in *Frederick E Rose (London) Ltd v. William H Pim & Co Ltd* [1953] 2 QB 450 at p. 461:

> In order to get rectification it is necessary to show that the parties were in complete agreement upon the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their h contract, one does not look into the inner minds of the parties – into their intentions – any more than one does in the formation of any other contract. One looks at their outward acts, that is at what they said or wrote to one another in coming to an agreement and then compares it with the document which they have signed. If one can predicate with certainty what the contract i was and that it is, by a common mistake wrongly expressed in the document, then one rectifies the document; but nothing less will suffice.

The above passage provides the template within which one could go about to consider the evidence in the instant case:

Having heard the parties, I am convinced that there was a mistake in the conveyance of the shop lots to the respective parties in spite of the insistence of the 1st defendant that he had intended to purchase shop No. 9 and that Mr. Yee had meant to sell to him only that lot.

I come to this conclusion because I believe Mr. Yee whose account of the antecedent that led to the sale and purchase of the shops lends credence to the 2nd plaintiff's claim. I also believe Dato' Daniel who corroborated Mr. Yee on this point. Needless to say both Mr. Yee and Dato' Daniel were independent witnesses who had no reason to take any side.

On the other hand, the 1st defendant's claim that he had intended to purchase only shop No. 9 is inconsistent with his inactivity immediately after the purchase. He had not as he would be expected to, taken any step to obtain vacant possession of shop No. 9 which was being occupied by the plaintiffs. Neither did he take any step to move out of shop No. 11 which he was occupying in order to allow the plaintiffs to occupy it.

His conduct after the purchase clearly shows that he had settled on the *status quo* before the respective purchase of the lots by the parties – with him occupying and remaining at shop No. 11 and the plaintiffs remaining where they were at shop No. 9 to continue to operate their provision shop. Even more telling is the fact that he had continued to collect rent from the tenant of the upstairs portion of shop No. 11 well after the purchase, stopping only after April 1995 after the 2nd plaintiff informed him of the discrepancy.

In the event and for the reasons aforesaid, I must so find that the respective land had been conveyed to the respective purchaser by mistake when the correct conveyance should have been as follows:

The land described as HS (D) Ka 6792/79 PT 18177 to the plaintiffs.

The land described as HS (D) Ka 6793/79 PT 18178 to the defendants.

I must also find for the same reasons that the mistake was mutual to the plaintiffs and the defendants at the time of the conclusion of the respective sales and purchase agreement in that the plaintiffs had indeed intended to purchase shop No. 9 and the defendants shop No. 11 – **although there was no direct contractual relationship between the plaintiffs and the defendants, a salient point of law raised by counsel for the defendants which I shall consider shortly**.

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A Question Of Privity

It was submitted that the defendants did not have anything to do with the plaintiffs. His contractual relationship was exclusively with Mr. Yee who represented his company in respect of the sale and purchase of his own shop lot and therefore there was no privity of contract less so a common mistake in the transaction. A rectification of the register document of title under s. 30 of the Specific Relief Act 1950, he submitted, can be made only in respect of mistakes common between two contracting parties. He relied on the commentary from *The Law of Specific Relief*, Dr SC Banerjee, 8th edn, 1988 at p. 413 with respect to s. 26 of the Indian Specific Relief Act 1963 which was in *pari materia* with s. 30 of our Specific Relief Act 1950:

> 11. "Representative-in-interest" – The expression includes heirs, transferees, executors, administrators, official receivers, official assignees and committee in lunacy. Under this section, the court will interfere only as between the original contracting parties, or those claiming under them in privity ... Sub-section (1) limits the operation of the section to either party of his representative-in-interest. So, rectification cannot be had by one who is neither a party to the contract nor instrument, nor the representative-in-interest of such a party.

Counsel for the plaintiffs on the other hand appears to have premised his argument on this issue on the *locus standi* of his clients to apply for a declaration they are now seeking. He relied on chiefly on the *ratio* of Abdoolcader J (then co-opted as a member of the panel) in the Federal Court case of *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 wherein at p. 178 he said:

> Although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, 'he must be somebody with such an interest in the subject – matter of the action as to justify his seeking relief (*Wilson, Walton International (Offshore Services) Ltd v. Tees & Hartlepools Port Authority* at p. 124).

But *locus standi* and privity of contract are poles apart. Whereas *locus standi* establishes a party's right to appear and sue in a non contractual cause of action, privity is concerned strictly with the rule that a non party cannot bring an action against another in contract. The rule with respect to the rectification of instruments under s. 30 of the Specific Relief Act 1950 is concerned with "mutual mistakes of the parties" which could only arise between parties to a contract. It follows that unless the plaintiffs are able to establish in law that there is a contractual relationship with the defendants, a rectification of the register document of title of their property does not arise – an issue which I shall now consider.

Is There A Contract Between The Plaintiffs And The Defendants?

It can be readily appreciated that as between the plaintiffs and the defendants there was no visible agreement as such as they had in each case entered into a separate sales and purchase agreement with Hung Chun Sdn Bhd.

But the question whether a contract exists or not between parties has to be judged not by merely what the parties have outwardly intended, but also by what they have said, written or done. As Brian CJ said:

> the intent of a man cannot be tried, for the Devil himself knows not the intent of man (Anon 1477 YB 17 Edw 4, fo 1, p 12.)

To do justice, the courts may have to go beyond the immediate inferences that may be drawn from words and acts and may construct therefrom a contract between persons who would seem, at first sight not to be in contractual relationship with each other at all. (See *Cheshire Fifoot & Furmstone's Law of Contract*, 12th edn, Constructing a contract at p. 28.)

Thus in *Clarke v. The Earl of Dunraven and Mount-Earl* [1897] AC 59, the owners of two yatchs entered them for the regatta of a yatch club. The rules of the club to which each of the owner had committed himself by letter to be bound obliged him to pay 'all damages' caused by fouling. In the course of the race the defendant fouled the plaintiff's yatch causing her to sink. Notwithstanding that there was no direct contractual relationship between the plaintiff and defendant, the plaintiff sued the defendant for damages contending that by entering the competition in accordance with the rules of the club a contract had been created between the competitors inter-se by which they had bound themselves to pay 'all damages'.

The question that subsequently went before the House of Lords was whether any contract had been made between the plaintiff and the defendant given that their immediate contractual relationship were not with themselves but with the yatch club on an individual basis. It held affirming the decision of the Court of Appeal, that a contract (collateral to the main one that had been entered with the yatch club by the participants including the plaintiff and the defendant) had been created between them as they have accepted the rules as binding upon them, and therefore the defendant was liable in damages.

In *Shankling Pier Ltd v. Detel Products Ltd* [1951] 2 All ER 471 the plaintiff entered into a contract with a company to repair and repaint their pier. Under this contract the plaintiffs had the right to specify the materials to be used. The defendants induced the plaintiffs to use a particular paint made by them giving the plaintiff assurance of its quality. The company used the paint as specified with unsatisfactory result. On being sued by the plaintiffs for breach

of their undertaking, the defendants pleaded that there was no contract between the plaintiff and the defendants. It was held that there was a contract between the plaintiff and the defendant on the premise that the defendants had guaranteed the suitability of the paint in return for specifying that the defendants' paint be used by the company.

(See also *Rayfield v. Hand* [1958] 2 All ER 194; *Esso Petroleum Ltd v. Customs and Excise Comrs* [1976] 1 All ER 117.)

The principle in *Clarke v. Dunraven* is now well established and has been applied and expanded in subsequent cases in England and other common law jurisdictions, including ours. Its scope could not have been better described and explained that in the judgment of Raja Azlan Shah CJ Malaya (as he then was) in *Tan Swee Hoe Co Ltd. v. Ali Hussein Bros* [1980] 2 MLJ 16 wherein a number of English judgments were cited in support. Of those that were considered by his Lordship, the speech of Lord Moulton in *Heibut, Symonds & Co v. Buckleton* [1913] AC 30, at 47 is of special relevance to the instant case. This was what he said:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of another contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.

Tan Swee Hoe was applied in *Kluang Wood Products Sdn Bhd v. Hong Leong Finance Bhd* [1994] 4 CLJ 141. In that case Siti Norma Yaacob J (as she then was) had to decide whether an oral representation to provide end financing could constitute a collateral contract that exists side by side with the main contract of providing a bridging finance to the plaintiff. In the course of her ruling in that case that the representation amounted to a collateral warranty it was held that for a collateral contract to exist, the plaintiffs must show (1) that there must be a representation which was intended by the defendants to be relied upon; (2) the representation induced the signing of the contract and, (3) in the peculiarity of the facts in that case, the representation must amount to a warranty, existing side by side with it.

A relevant aspect of the doctrine with respect to consideration in a collateral contract was also expressed in *Kah Seng Construction Sdn Bhd v. Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448 wherein Low Hop Bing J in holding that a collateral contract did not exist in that case said at p. 454 that:

> A collateral contract comes into existence prior to or at the time of the conclusion of the main contract. The consideration for the collateral contract is the making of the main contract.

A confined reading of the cases cited above however, may lead one to conclude that collateral contracts can be legitimately constructed by the courts only in cases where a warranty by one party had induced the other party to enter into a main contract. But the word warranty here merely typifies the conduct deemed sufficient by the courts to support a collateral contract. A collateral contract is founded basically on the representation that a party may have made to the other that may have induced him to enter into the main contract – an environment best described by Lord Denning MR in *Dick Bentley Productions, Ltd v. Harold Smith (Motors), Ltd* [1965] 2 All ER 65, at 57 in a passage which was also relied upon by the Federal Court in *Tan Swee Hoe, supra* as follows:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

A collateral contract need not therefore be constructed from the same parties to the main contract, but also where each has on his own contracted with a common third party. As the two landmark cases of *Clarke v. Dunraven and Shankling Pier (supra)* had shown, it can be constructed from a contractual relationship which is common to both the parties – in the former, the yatch club and in the latter the company employed to paint the pier.

Now to recall the antecedent that led to the signing of the sales and purchase agreements by the plaintiffs and the defendants at the office of the solicitor Dato' Daniel:

It is clear that the 2nd plaintiff had agreed to purchase shop No. 9 after being told by Mr. Yee that the 1st defendant had wanted to purchase the same lot and that he was being offered the first option to purchase; and the 1st defendant had purchased only shop No. 11 as the 2nd plaintiff would be purchasing shop No. 9.

From this reciprocal understanding and arrangement one can legitimately conceptualise a contract within the paradigm suggested by Lord Moulton in *Heibut Symonds & Co (supra)* in the following form:

> If you buy shop No. 9, then I will buy only shop No. 11; otherwise I will buy both shop No. 9 and shop No. 11

and, to construct a collateral contract between the 2nd plaintiff and the 1st defendant on the following terms and conditions:

(i) provided that the plaintiff purchase shop No. 9, the defendant would purchase only shop 11 and,

(ii) provided that the plaintiff would not purchase shop No. 9, the defendant would be at liberty to purchase shop No. 9.

The representation and inducement (in the sense described in *Kluang Wood Products (supra))* that led to the collateral contract is self-evident.

With respect to the representation – it is true the 2nd plaintiff by his own admission, had not communicated with the 1st defendant before he decided to purchase shop No. 9 and therefore it could not be said that the 1st defendant had represented to him that if he did not buy up his own lot someone else would buy it. But Mr Yee did make that representation and although he did not disclose the name of the 1st defendant to the 2nd plaintiff it was clear at that instance that the 1st defendant was his undisclosed principal.

With respect to the inducement, this becomes obvious when the 2nd plaintiff decided to purchase his lot after telling Mr. Yee he needed time to consider.

The consideration in this case would be provided (following *Kah Seng Construction, supra*) by the contract that each parties entered into with Hung Chun Sdn Bhd subsequently to purchase the respective lot.

The Order

Having established the existence of the collateral contract, and a common mistake in the conveyance of the respective lots of properties it follows that the plaintiffs are entitled to activate the provision of s. 30 of the Specific Reliefs Act 1950 to rectify the respective entry in the register document of title to express in each case the true intent of the parties.

Let there be an order that the Registrar or Land Administrator be directed under s. 417 of the National Land Code to make the necessary rectification on the respective register document of title as well as on the issue document of title.

Let the counter-claim of the defendants be dismissed with costs.

Let the defendants pay the costs of this action.